**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

CENTRAL AMERICAN RESOURCE CENTER, et al.,

*Plaintiffs*,

v.

KENNETH T. CUCCINELLI II, in his official capacity as Senior Official Performing the Duties of the Director of U.S. Citizenship and Immigration Services, et al.,

*Defendants.*

Case No. 20-cv-02363 (RBW)

**ORAL ARGUMENT REQUESTED**

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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## INTRODUCTION

This case concerns a policy Defendants implemented in December 2019 that effectively bars eligible Temporary Protected Status ("TPS") beneficiaries with removal orders—many of whom have called the United States home for decades—from securing a more permanent immigration status. On December 20, 2019, Defendants announced through a policy alert (the "TPS Policy Alert") that they would no longer consider authorized travel abroad to "result in the execution of any outstanding removal order to which a TPS beneficiary may be subject."[1] The effect of this change, which runs counter to unambiguous language in the Immigration and Nationality Act ("INA") and the U. S. Citizenship and Immigration Services's ("USCIS") long-held interpretation, is to strip USCIS of jurisdiction over adjustment of status applications submitted by TPS beneficiaries with removal orders and to deprive these individuals of a forum in which they can adjust to lawful permanent resident status.

Defendants move to dismiss on the grounds that the Court lacks jurisdiction over this case and that Plaintiffs have failed to state claims under the Administrative Procedure Act ("APA"), the Federal Vacancies Reform Act ("FVRA"), and the U.S. Constitution. Both sets of arguments rest on mischaracterizations of the Complaint, misunderstandings of the governing law, and/or factual disputes inappropriate for this phase of the case. They ultimately fail.

To start, the Court has jurisdiction. The Individual Plaintiffs have standing because they have plausibly alleged—and indeed shown—that the TPS Policy Alert changed USCIS's approach to adjustment applications, blocking their path to adjustment. CARECEN, too, has standing because it has diverted resources in response to the TPS Policy Alert, which undermines

[1] U.S. Citizenship and Immigr. Servs. ("USCIS"), PA-2019-12, *Policy Alert: Effect of Travel Abroad by Temporary Protected Status Beneficiaries with Final Orders of Removal*, at 1 (Dec. 20, 2019), https://perma.cc/DT8L-QVE7.

core aspects of its mission, interferes with its ability to form important client relationships, and causes it economic harm. Like the rest of the Individual Plaintiffs, Mr. Medina, Ms. Alvarez, and Ms. Ramirez's claims are both constitutionally and prudentially ripe; the TPS Policy Alert impedes their path to adjustment, and no further factual development would aid in the resolution of their purely legal claims. Nor does exhaustion preclude their claims because the challenge here is to a policy, not an individual adjudication, and, in any event, the entire point is that, by traveling on advance parole, Plaintiffs have executed their removal orders and are entitled to pursue adjustment through USCIS and not the Executive Office of Immigration Review ("EOIR"). And finally, the INA's jurisdictional bars do not apply here because, again, Plaintiffs' claims challenge a policy of general applicability concerning USCIS's jurisdiction, not any action taken to effectuate their removal orders.

Plaintiffs have also stated cognizable claims. The TPS Policy Alert is contrary to law because it cannot be squared with the unambiguous text of the INA, which states that "any alien ordered deported or removed … who has left the United States, shall be considered to have been deported or removed." 8 U.S.C. § 1101(g). The TPS Policy Alert is also a "legislative rule" because it alters the rights of TPS beneficiaries and was therefore unlawfully issued without notice and comment. Aside from its substance, the TPS Policy Alert violates the FVRA because it was enacted by Defendant Kenneth T. Cuccinelli; multiple courts have concluded that either his service or the service of the official who appointed him was unlawful. *See, e.g.*, *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 27 (D.D.C. 2020). Finally, the TPS Policy Alert was motivated by discriminatory animus in violation of the Fifth Amendment's equal protection guarantee.

## BACKGROUND

### A. Statutory and regulatory background

This case involves two legal regimes implicating the interests of TPS beneficiaries: the rules governing TPS, and those governing which immigrants may apply to adjust their status to lawful permanent resident ("LPR").

#### *1. The Temporary Protected Status program*

The Immigration Act of 1990 established TPS. Under that program, the Secretary of Homeland Security, *see* 6 U.S.C. § 557, is authorized to designate countries experiencing armed conflict, natural disaster, epidemic, or other extraordinary conditions, and to grant TPS to the nationals of those countries. *See* Pub. L. 101-649, § 302, 104 Stat. 4978, 5030, *codified at* 8 U.S.C. § 1254a. TPS is available to noncitizens regardless of whether they entered the United States lawfully, including those who are subject to a final removal order. 8 U.S.C. § 1254a(c)(1)(A), (2). Status under the program not only provides beneficiaries with protection from removal and work authorization, *id.* § 1254a(a)(1), but also allows beneficiaries to "travel abroad with the prior consent" of the government, *id.* § 1254a(f)(3).

#### *2. The adjustment of status process*

Although TPS provides only temporary protection, beneficiaries with a qualifying relationship to a U.S. citizen may adjust to LPR status. LPR status confers many important benefits, including authorization to live and work in the United States indefinitely, *see id.* § 1101(a)(20), and eligibility to eventually become a U.S. citizen, *id.* § 1427(a), (b).

To apply for adjustment, TPS beneficiaries must determine both whether they are eligible and which agency has jurisdiction over their application. Eligibility requires that, in addition to possessing a qualifying relationship to a U.S. citizen, *see id.* § 1151(b)(2)(A)(i), applicants must

demonstrate that they have been inspected and admitted or paroled into the United States, are admissible, and that an immigrant visa is immediately available to them, *id.* § 1255(a).

Depending on the circumstances, exclusive jurisdiction over an adjustment application will lie with either USCIS or EOIR—the Justice Department component that presides over immigration court proceedings to remove noncitizens from the United States. 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1)(i). For individuals with a prior removal order, which agency has jurisdiction over their adjustment application turns on whether the order has been "executed." If the individual is subject to an unexecuted removal order, EOIR has jurisdiction. *Id.* § 1245.2(a)(1)(i). If the removal order has been executed, USCIS has jurisdiction. *Id.* § 245.2(a)(1). The government concedes that a person is no longer "considered to be 'in proceedings'" when an order of removal is executed (and thus exclusive jurisdiction over an application for adjustment of status will lie with USCIS). Mem. in Supp. of Defs.' Mot. to Dismiss ("Defs.' Br.") at 2 n.3, ECF No. 30-1.[2]

There are stark differences in the adjudicative process between the two agencies. USCIS offers a non-adversarial adjudication of the adjustment application, USCIS, *Adjustment of Status*, https://perma.cc/9UGN-AB2K (last updated Sept. 25, 2020), whereas EOIR adjudications are adversarial proceedings before an immigration judge, USCIS, *Immigration Benefits in EOIR Removal Proceedings*, https://perma.cc/Y77G-ZRZU (last updated Aug. 5, 2020). Most importantly, applications to USCIS receive *direct review* of the merits, whereas an application to EOIR—assuming it could even be made—does not.

[2] The regulations separately provide that USCIS has exclusive jurisdiction over adjustment applications of "arriving aliens," even those in pending removal proceedings. An "arriving alien" is "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport." 8 C.F.R. § 1.2. Plaintiffs have not alleged that they are "arriving aliens."

Where jurisdiction properly lies with EOIR, and the immigration case has concluded with the issuance of a final removal order, the applicant will need to convince the immigration court to reopen the closed case; a separate, and now impossible, task. The statutory right to reopen is generally unavailable to those who become eligible for adjustment more than 90 days after his or her removal order was entered and also to those who departed the United States while the removal order was effective. *See* 8 C.F.R. §§ 1003.2(c)-(d), 1003.23(b)(1). Those circumstances will necessarily apply to many TPS beneficiaries, including the Individual Plaintiffs, who traveled abroad with USCIS's consent long after receiving a final removal order, *see* Compl. ¶ 25; 8 C.F.R §§ 1003.2(c)-(d), 1003.23(b)(1). Such individuals are therefore reliant on the immigration court exercising its *sua sponte* authority to reopen their case for "exceptional circumstances." *See Matter of J-J-*, 21 I. & N. Dec. 976, 976 (BIA 1997). But that long-shot pathway has been foreclosed by an EOIR rule that "removes the Attorney General's previous general delegation of *sua sponte* authority to the BIA and immigration judges to reopen or reconsider cases," and limits use of that authority "to correct minor mistakes, such as typographical errors or defects in service." 85 Fed. Reg. 81,588, 81,591 (Dec. 16, 2020) (announcing January 15, 2020 effective date). Thus, by announcing that a TPS beneficiary's authorized departure will not execute his or her removal order, the TPS Policy Alert strips jurisdiction from the only agency able to adjudicate adjustment applications for TPS beneficiaries with removal orders.

***3. Defendants' past practices***

Defendants have repeatedly recognized that "a TPS alien who departs the United States while a deportation order is in effect carries out his or her own deportation." Memorandum from Paul W. Virtue, Acting Gen. Couns., INS to Terrance O'Reilly, TPS Coordinator, INS, *Advanced Parole for TPS Eligible Aliens in Deportation Proceedings*, Genco Op. 91-49, 1991

WL 1185160, at *3 (June 17, 1991); *Matter of R-D-S-B-*, 2018 WL 5981636 (DHS), at *2–3 (AAO Oct. 26, 2018) (concluding that TPS beneficiary's "departure executed his final order of removal"); *In re* [Name redacted], 2013 WL 5504876 (DHS), at *3 (AAO Feb. 22, 2013) (concluding that TPS beneficiary's departure on advance parole "executed his final order of removal"); *cf. Nken v. Holder*, 556 U.S. 418, 440 (2009) ("Removal orders 'are self-executing orders, not dependent upon judicial enforcement.'") (quoting *Stone v. INS*, 514 U.S. 386, 398 (1995)). And upon lawfully returning with USCIS's prior consent, the TPS beneficiary would meet the eligibility requirements for adjustment of status, 8 U.S.C. § 1255(a), and USCIS would accept jurisdiction over that application.

## B. Factual background

### *1. The TPS Policy Alert*

On December 20, 2019, then-purported acting Director of USCIS, Ken Cuccinelli, issued the TPS Policy Alert, which states, in relevant part, that:

> [A] TPS beneficiary who obtains USCIS['s] authorization to travel abroad temporarily (as evidenced by an advance parole document) and who departs and returns to the United States in accordance with such authorization remains in the same exact immigration status and circumstances as when he or she left the United States. ***Such travel does not result in the execution of any outstanding removal order to which a TPS beneficiary may be subject***.

TPS Policy Alert at 1 (emphasis added). The TPS Policy Alert thus announced a new nationwide policy under which a TPS beneficiary's departure no longer has any legal effect on a prior removal order, which would remain un-executed. *See id.* Through the TPS Policy Alert, USCIS effectively divested itself of jurisdiction over adjustment applications submitted by this subset of TPS beneficiaries. *See id.*

Documents implementing the new policy illustrate that Defendants rely entirely on language in Section 304(c) of the Miscellaneous and Technical Immigration and Naturalization

Amendments of 1991 ("MTINA")—a set of technical amendments to the TPS statute—as the basis for this important change. *See Policy Manual* ("USCIS-PM"), USCIS, at vol. 7, pt. A, ch. 3 n.19, https://perma.cc/FVK5-LK7G (last updated Dec. 15, 2020) (citing MTINA, Pub. L. 102-232, § 304(c), 105 Stat. 1733, 8 U.S.C. § 1254a note).

***2. The Individual Plaintiffs***

Each of the Individual Plaintiffs is a TPS beneficiary with a prior order of removal, who has traveled abroad with USCIS authorization and then lawfully returned, and who has applied or has taken predicate steps in anticipation of applying for adjustment of status with USCIS based on a qualifying relationship to a U.S. citizen. Prior to the TPS Policy Alert, each would have been eligible to apply to USCIS for adjustment of status. *See* Compl. ¶¶ 182, 185. The TPS Policy Alert now stands in their way. *See id.* ¶¶ 30, 36, 42, 49, 55, 60, 66, 181.

Indeed, after the issuance of the TPS Policy Alert, USCIS denied the applications of Ms. Romero, Mr. Velasco, Ms. Hernandez, and Ms. Bazile, even though all four applied prior to the Policy Alert's publication. *See id.* ¶ 182. Mr. Medina, likewise, applied for adjustment before the TPS Policy Alert issued and, while his application remains pending before USCIS, the TPS Policy Alert makes an adverse outcome a virtual certainty. *Id.* ¶ 183. Plaintiffs Alvarez and Ramirez are both eager to apply for adjustment, and took predicate steps to successfully do so under Defendants' prior policy, but have since abstained from applying; both understand that doing so while the TPS Policy Alert remains in effect would be futile. *See id.* ¶ 60, 66, 185.

The TPS Policy Alert thus eliminates adjustment through USCIS, leaving only the theoretical possibility of adjustment through EOIR. But, for the reasons discussed above, *see supra* at 5, adjustment through EOIR is not available to any of the Individual Plaintiffs. Thus, the Individual Plaintiffs, and those similarly situated, have no reasonable chance to even *apply* for adjustment of status if, as the TPS Policy Alert guarantees, EOIR has jurisdiction over their case.

The TPS Policy Alert therefore harms the Individual Plaintiffs by leaving them in an uncertain and precarious position. Absent the TPS Policy Alert, each would be able to advance toward obtaining the more secure immigration status of LPR. The TPS Policy Alert presently frustrates that effort, and with it their ability to gain a more secure immigration status that will allow them to better plan for their future and ensure they can remain connected to their families and communities. It delays their ability to become a naturalized U.S. citizen, should they wish to do so. And, despite Defendants' efforts to present the risk of removal as a remote possibility, the fact remains that Defendants are presently attempting to rescind the TPS protection that now safeguards the Individual Plaintiffs from removal, while, at the same time, declining to state with certainty that such individuals will not become an enforcement priority should they lose TPS status before they are able to adjust to LPR—*see, e.g.*, Status Report, ECF No. 34 ¶ 13(m); a distinct possibility given the time I-485 adjudications take, *see, e.g.*, USCIS, *Processing Time for Application to Register Permanent Residence or Adjust Status (I-485) at Baltimore MD*, https://egov.uscis.gov/processing-times/ (last visited Dec. 17, 2020) (estimated processing time: 14.5 and 26.5 months).

Plaintiff CARECEN is a non-profit corporation, organized under the laws of the District of Columbia, that works to foster the comprehensive development of the Latino population in the Washington, D.C. area by providing legal counseling and community education services. Compl. ¶ 68. Among other low- or no-cost services, CARECEN advises individuals on the TPS program, including TPS beneficiaries with final removal orders who wish to adjust to LPR status. *Id.* The TPS Policy Alert has disrupted CARECEN's mission and operations, including by forcing CARECEN to divert resources to studying the impact of the TPS Policy Alert and to establish new screening and client intake procedures to ensure it does not take on difficult and time-

consuming cases where, because of the TPS Policy Alert, the individual must apply for adjustment of status through EOIR. *Id.* ¶ 193. By the same token, the TPS Policy Alert has interfered with CARECEN's ability to form client relationships. *Id.* ¶¶ 194-95.

### C. Proceedings in this Court

Plaintiffs filed the Complaint, ECF No. 1, on August 26, 2020, asserting seven claims: (I) the TPS Policy Alert violates the INA, 8 U.S.C. § 1101(g), and is therefore contrary to law, Compl. ¶¶ 199-203; (II) the TPS Policy Alert is arbitrary and capricious, *id.* ¶¶ 204-09; (III) the TPS Policy Alert was unlawfully issued without notice and comment, *id.* ¶¶ 210-14; (IV) the TPS Policy Alert was issued by an acting official, Mr. Cuccinelli, who did not meet the requirements of the FVRA, *id.* ¶¶ 215-21; (V) Mr. Cuccinelli's service violated the Appointments Clause of the Constitution, *id.* ¶¶ 222-26; (VI) the TPS Policy Alert is *ultra vires*, *id.* ¶¶ 227-29; and (VII) the TPS Policy Alert violates the equal protection guarantee incorporated into the Fifth Amendment because it discriminates on the basis of race, national origin, and nationality, and was motivated by animus and a desire to affect such discrimination, *id.* ¶¶ 230-34.

Plaintiffs subsequently moved for a preliminary injunction or, in the alternative, partial summary judgment on Counts I-IV. ECF No. 15. Defendants did not oppose that motion but instead sought to transfer this case to a different venue, ECF No. 19, which Plaintiffs opposed, ECF No. 21. After holding argument, the Court denied Defendants' transfer motion, observing that Plaintiffs' challenge is directed at an unlawful nationwide policy rather than the denials of Plaintiffs' individual adjustment applications, *see* Nov. 12, 2020 Hr'g Tr. at 14:16–16:8. Nov. 12, 2020 Min. Order. The Court further denied Plaintiffs' preliminary injunction motion without prejudice, ordered the parties to confer and to file a proposed schedule for briefing summary judgment by November 23, and extended Defendants' obligation to respond to the Complaint

until December 4. *Id.* Defendants filed a motion to dismiss on that date, ECF No. 30, and a motion for relief from Local Civil Rule 7(n) (release of administrative record).[3]

**LEGAL STANDARD**

A motion to dismiss pursuant to Rule 12(b)(1) "presents a threshold challenge to the Court's jurisdiction." *Gordon v. Off. of the Architect of the Capitol*, 750 F. Supp. 2d 82, 86–87 (D.D.C. 2010) (Walton, J.) (citation and quotation marks omitted). In adjudicating a motion to dismiss pursuant to Rule 12(b)(1), a court must "accord [the plaintiff] the benefit of all reasonable inferences," *Feldman v. FDIC*, 879 F.3d 347, 351 (D.C. Cir. 2018), but it may also "consider materials outside the pleadings," *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) "is intended to test the legal sufficiency of the complaint." *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1040 (D.C. Cir. 2003). "To survive a motion to dismiss, a complaint must contain sufficient factual material, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation marks and citation omitted). "A claim crosses from conceivable to plausible when it contains factual allegations that, if proved, would 'allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

On either motion, the Court must assume "that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555. "The standard for dismissing a complaint

[3] As Plaintiffs indicated at the December 7 and December 17 status conferences, they oppose Defendants' request for relief from Local Civil Rule 7(n), ECF No. 31. If Defendants' motion to dismiss is ultimately denied, the Court should order production of the administrative record to commence shortly thereafter.

with prejudice is high" and "is warranted only when a trial court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Belizan v. Hershon*, 434 F.3d 579, 583 (D.C. Cir. 2006) (quotation marks omitted).

## ARGUMENT

### I. The Court has jurisdiction over Plaintiffs' claims

None of Defendants' scattershot jurisdictional arguments warrants dismissal.

#### A. Plaintiffs have standing

To show Article III standing, a "plaintiff must have ... suffered an injury in fact, ... that is fairly traceable to the challenged conduct of the defendant, and ... likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). This burden is not demanding: "plaintiffs are required only to state a plausible claim that each of the standing elements is present." *Attias v. Carefirst, Inc.*, 865 F.3d 620, 625 (D.C. Cir. 2017) (quotation omitted). Both the Individual Plaintiffs and CARECEN have done so here.

##### *1. The Individual Plaintiffs have standing*

Although Defendants do not question that an individual who is blocked from adjusting status has suffered an injury-in-fact, they nevertheless assert that the Individual Plaintiffs lack a "causal connection between" that harm and the TPS Policy Alert and that they "cannot show that the relief they seek will likely redress their alleged injury." Defs.' Br. at 12. Defendants' arguments boil down to their view that because "USCIS relied on MTINA … to deny Plaintiffs[']applications," it is that statute—not the TPS Policy Alert interpreting and implementing it—that is the real source of harm. *See id.*[4] Defendants are incorrect.

[4] Defendants argue that the TPS Policy Alert properly interprets MTINA. But that is a merits issue and "court[s] must be careful not to decide the [standing] questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful." *Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003).

As an initial matter, there is ample evidence that, after MTINA's passage and before the issuance of the TPS Policy Alert, USCIS understood that an adjustment "[a]pplicant's departure execute[s] his final order of removal," which then places jurisdiction with USCIS. *Matter of R-D-S-B-*, 2018 WL 5981636, at *2–3; *In re* [Name redacted], 2013 WL 5504876, at *3. That is why the USCIS Adjudicator's Field Manual, citing Section 1101(g), plainly states that "[i]f an alien who is the subject of an outstanding order of removal departs from the U.S., even with an advance parole, he or she effects the order (i.e., self-deports[.])." USCIS, "Filing Locations and Jurisdiction," in *Adjudicator's Field Manual*, Ch. 54.2(b) (last visited Dec. 15, 2020) (attached as Exhibit 1).[5]

Defendants do not mention any of this evidence, but instead assert that the TPS Policy Alert had no practical effect because, in several cases "preceding December 2019," USCIS voluntarily rejected jurisdiction over applications in the manner the TPS Policy Alert now commands them to do. Defs.' Br. at 14. But the TPS Policy Alert creates an unwavering nationwide policy that requires that USCIS decline jurisdiction, *see* USCIS-PM Vol. 7, Pt. A, Ch. 3 n.19, and thus goes far beyond these few discretionary case-specific decisions, which are contrary to the other decisions and guidance documents discussed above. Indeed, adopting Defendants' argument requires assuming that USCIS achieved nothing by promulgating the TPS Policy Alert—that it published the Alert simply to tell its officers what they already knew.

Defendants' examples are also unilluminating. Defendants cite only three cases in which a field office declined jurisdiction over an adjustment application on the basis of MTINA, and

[5] CARECEN's experience as a provider of immigration legal services in the Washington, D.C. region further confirms this. *See* Declaration of Genevieve Augustin, attached as Exhibit 2 ("Prior to the December 2019 TPS Policy Alert, USCIS consistently assumed jurisdiction over adjustment of status applications filed by TPS beneficiaries who had traveled on advance parole, regardless of whether the person had previously been ordered removed.").

only one, *Espinosa*, involves a field office located in a region relevant to the Individual Plaintiffs. *See* Mem. Op., *Galindo Gomez v. USCIS*, No. 19-cv-3456 (ABJ) (D.D.C. Nov. 13, 2020), ECF No. 21 (Texas), ECF No. 30-2;[6] *Santa Maria v. McAleenan*, No. 18-cv-3996, 2019 WL 2120725 (S.D. Tex. May 15, 2019) (Texas); *Del Carmen Espinosa v. Swacina*, No. 19-cv-21315, 2019 WL 6682836 (S.D. Fla. Dec. 6, 2019) (Florida). Even in *Espinosa*, USCIS denied adjustment on the basis that the plaintiff's return on advance parole did not render her an "arriving alien," not that the plaintiff's travel had failed to execute her removal order. 2019 WL 6682836, at *1. It therefore provides no basis to conclude that USCIS interpreted MTINA to mean that travel does not execute a removal order. And it does nothing to overcome the substantial evidence cited above showing that USCIS previously understood a TPS beneficiary who departs the United States with a removal order to have executed the order.

Even if Defendants could show that USCIS officials sometimes rejected jurisdiction over applications submitted by individuals situated similarly to the Individual Plaintiffs, they would still not prevail on standing. "[C]ausation may be established where defendant caused an 'incremental' part of the alleged injury." *Scahill v. D.C.*, 271 F. Supp. 3d 216, 228-29 (D.D.C. 2017) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007)), *aff'd*, 909 F.3d 1177 (D.C. Cir. 2018); *Attias*, 865 F.3d at 629 ("[S]tanding does not require that the defendant be the most immediate cause, or even a proximate cause, of the plaintiffs' injuries"). And so if the TPS Policy Alert did nothing more than incrementally constrain the ability of USCIS officials to accept jurisdiction over applications submitted by individuals similarly situated to the Individual

[6] Defendants' suggestion that *Galindo Gomez* "rejected similar arguments" as those raised by Plaintiffs here is also misplaced. Defs.' Br. at 12. Because the plaintiff in that case failed to "allege[] that he was injured by the [portion of the USCIS Policy Manual codifying the TPS Policy Alert], or that striking down the revision to the Policy Manual would redress his injury," the court did not reach the merits of his APA claim. Mem. Op., *Galindo Gomez*, No. 19-cv-3456 (ABJ), at 12. The Complaint suffers from no such pleading deficiency.

Plaintiffs, thereby making it marginally more likely that such adjustment applications would be rejected, that would be more than sufficient.

At most, Defendants have created a factual dispute about what individual USCIS field offices would have done absent the TPS Policy Alert, which applies nationwide. Resolution of that dispute should await full factual development, including the production of an administrative record that could well show the extent to which the agency itself understood that the TPS Policy Alert changed existing practice and thus harmed Plaintiffs. *See Vargus v. McHugh*, 87 F. Supp. 3d 298, 302 (D.D.C. 2015) (declining to dismiss where the defendant's arguments, including jurisdictional arguments, relied "at least in part, upon the Administrative Record"). Especially in the absence of such a record, the Court should reject Defendants' request that it assume the TPS Policy Alert simply restated uniform existing practice.[7]

**2. CARECEN has standing**

The Supreme Court "has made plain that a 'concrete and demonstrable injury to [an] organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests' and thus suffices for standing." *PETA v. USDA*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). To make this determination, "[a court asks], first, whether the agency's action or omission to act injured the organization's interest and, second, whether the organization used its resources to counteract that harm." *Id.* at 1094 (cleaned up). Defendants do not dispute that CARECEN has diverted resources because of the TPS Policy

[7] For the same reasons, an order from this Court vacating the TPS Policy Alert will provide adequate redress insofar as the Individual Plaintiffs will be able to apply (or re-apply) for adjustment of status to USCIS without interference from the erroneous reading of MTINA that the TPS Policy Alert foists upon USCIS field offices nationwide.

Alert, and so the only question is whether CARECEN's operations have been "perceptibly impaired." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015).

CARECEN has plausibly alleged that the TPS Policy Alert undermines core aspects of its mission. Prior to the TPS Policy Alert, CARECEN helped TPS beneficiaries with removal orders adjust their status by counseling them to seek USCIS's advance permission to travel abroad. *See* Compl. ¶¶ 193-94. The TPS Policy Alert eliminates that path to adjustment, and, in combination with EOIR's recent rule removing the ability of immigration judges to reopen cases *sua sponte*, *see* 85 Fed. Reg. at 81,591, makes it impossible for TPS beneficiaries with removal orders to adjust their status at all. Rather than assisting TPS beneficiaries with these applications, CARECEN has instead devoted time and resources to establishing screening procedures designed to ensure that it does not take on these individuals as clients, since doing so would commit it to the onerous and futile endeavor of trying to reopen time-barred immigration cases. Compl. ¶ 193. "These [allegations]—the substance of which Defendants do not contest—show that the Rule both conflicts with [CARECEN's] mission[] and inhibits [its] daily activities." *Cap. Area Immigrants' Rts. Coal. v. Trump*, 471 F. Supp. 3d 25, 39 (D.D.C. 2020).

By the same token, CARECEN has lost an important and valuable part of its client base. Interference with the formation of client relationships is a well-established form of injury-in-fact. *See, e.g.*, *O.A. v. Trump*, 404 F. Supp. 3d 109, 142-43 (D.D.C. 2019) (finding that immigrant services organization had standing where it was "unable to represent the same number of clients"); *Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67, 78 (D.D.C. 2001) (financial advisor's loss of customers and "possibly permanently damaged relationships" with customers); *League of Women Voters v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) (voter registration organization's loss of access to prospective registrants). CARECEN has plausibly alleged that it

is unable to assist TPS beneficiaries with removal orders in the only venue left open to them, meaning it cannot form and further client relationships with such TPS beneficiaries. Compl. ¶ 194. This deprives CARECEN of the opportunity to collect fees for its services counseling such TPS beneficiaries on how to adjust their status. *Id.* ¶ 196. Economic loss is a classic form of injury-in-fact. *Osborn v. Visa, Inc.*, 797 F.3d 1057, 1064 (D.C. Cir. 2015) (quotation omitted).

These injuries are concrete, not abstract, and they compound with time. CARECEN's ability to retain and assist clients is necessary to provide them with additional services from which they might benefit. CARECEN's fee-based work supports and furthers its mission and organizational operations as a whole. Defendants' analogy to *Food & Water Watch* therefore misses the mark. Defs.' Br. at 15-16. The point is that CARECEN's existing operations are frustrated and complicated by Defendants' actions, not that Defendants' actions have exacerbated some problem in the world (like foodborne illness in *Food & Water Watch*) that CARECEN must go out and solve. It is therefore more than plausible that the TPS Policy Alert—by erecting a jurisdictional wall to many of CARECEN's TPS beneficiary clients—will "perceptibly impair[]" CARECEN's operations. *Food & Water Watch*, 808 F.3d at 919.

Defendants' other responses fare no better. ***First***, Defendants rely on a Fourth Circuit panel's divided decision in *CASA de Maryland v. Trump*, which held that an organization lacked standing to challenge an immigration regulation because "nothing in the Rule directly impairs CASA's ability to provide counseling, referral, or other services to immigrants." 971 F.3d 220, 238-39 (4th Cir. 2020). That is plainly not the case here, where the TPS Policy Alert blocks CARECEN from using one of its primary tools for helping the Central American immigrant community, and its sizeable TPS beneficiary population, apply to adjust their status. *See* Compl. ¶¶ 68, 193. But even if it were, the Fourth Circuit granted rehearing *en banc* in *CASA* the day

before Defendants filed their motion. Order, No. 19-2222, --- F. 3d. ---, 2020 WL 7090722 (4th Cir. Dec. 3, 2020) (granting petition for rehearing en banc). *CASA* is therefore distinguishable, not the law in this Circuit, and may not even be the law in the Fourth Circuit for much longer.

***Second***, Defendants insist that "CARECEN … can still provide legal services to immigrants," and so is still able to "*operate* as an organization." Defs.' Br. at 17 (quotation omitted). "But under the law of this Circuit, the injury requirement is not so demanding." *Cap. Area Immigrants' Rts. Coal.*, 471 F. Supp. 3d at 40. The question is whether CARECEN's operations have been "perceptibly impaired," not whether they have been "entirely hamstrung." *Id.* (quoting *O.A.*, 404 F. Supp. 3d at 143); *see also League of Women Voters*, 838 F. 3d at 9 ("obstacles" that made it "*more difficult* for the Leagues to accomplish their primary mission" constituted injury) (emphasis added). CARECEN alleges precisely the kind of operational impairment—rather than mere voluntary resource diversion or policy disagreement—that gives it standing under Article III.

**B. The claims of Mr. Medina, Ms. Alvarez, and Ms. Ramirez are ripe**

For many of the same reasons, Defendants' contention that the claims of Mr. Medina, Ms. Alvarez, and Ms. Ramirez are unripe is meritless. The ripeness doctrine is meant "to prevent the courts … from entangling themselves in abstract disagreements over administrative policies" and "to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). Neither concern is present here.

To start, the claims of Mr. Medina, Ms. Alvarez, and Ms. Ramirez are constitutionally ripe because each has suffered an injury-in-fact. *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1428 (D.C. Cir. 1996). Like the other Individual Plaintiffs—whose injuries

Defendants do not contest as insufficient—they have been denied a forum in which they can adjust their status. The only difference between their claims and those of the other Individual Plaintiffs is that they have not yet filed a futile application and been turned away—or in the case of Mr. Medina, finished waiting for the inevitable denial from USCIS. But they have otherwise been injured in precisely the same ways: they relied on USCIS's past practice in spending money and time to travel, Compl. ¶¶ 53, 59, 65, 188; they can only adjust status by first prevailing on a motion to reopen with the immigration court, which is guaranteed to fail, *see* 85 Fed. Reg. at 81,591; they must wait even longer to naturalize to U.S. citizenship, *see* Compl. ¶ 81; and Defendants continue to work to end TPS entirely, exposing them to removal, *id.* ¶ 186. These delays, as well as the risk of removal they impose, constitute injury-in-fact, *Kirwa v. U.S. Dep't of Def.*, 285 F. Supp. 3d 21, 43 (D.D.C. 2017)—and thereby establish constitutional ripeness.

Prudential ripeness poses even less of a barrier. In assessing prudential ripeness, courts must consider "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). As to fitness for review, Plaintiffs' "purely legal claim in the context of a facial challenge … is presumptively reviewable," *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005) (quotation omitted). The Court will gain no further clarity or insight on these issues by compelling Mr. Medina to await an adverse decision on his application—the timing of which is in Defendants' hands—or Ms. Alvarez and Ms. Ramirez to submit a futile application. And because the issues in this case are "fit for review, there is no need to consider 'the hardship to the parties of withholding court consideration.'" *Cohen v. United States*, 650 F.3d 717, 735 (D.C. Cir. 2011) (quoting *Action for Children's Television v. FCC*, 59 F.3d 1249, 1258 (D.C. Cir. 1995)). Nevertheless, delaying review would harm these

Plaintiffs by preventing them from adjusting to LPR—especially given that their injuries arise from delay in the first place. Thus, all of the Individual Plaintiffs' claims are ripe.[8]

### C. The doctrine of administrative exhaustion does not deprive the Court of jurisdiction over the Individual Plaintiffs' claims

Defendants also contend that the Individual Plaintiffs "have failed to exhaust their administrative remedies" because none of them have moved to reopen their closed immigration cases to pursue adjustment of status through EOIR. Defs.' Br. at 17-19. But there are no administrative remedies to exhaust. No statute or doctrine requires Plaintiffs here to exhaust any remedial process before bringing an APA challenge to an unlawful agency policy.

This argument, like many of Defendants' jurisdictional arguments, instead hinges on a misunderstanding of the nature of Plaintiffs' case. Plaintiffs bring a facial challenge to the TPS Policy Alert, which unlawfully prevents them from adjusting status through USCIS. *See* Compl. ¶¶ 19-22. Plaintiffs thus challenge an unlawful agency policy that forecloses their access to a previously available process. It is no answer to say that Plaintiffs must exhaust a separate process—reopening their cases and appealing through the immigration courts—before challenging that policy. *Cf. Cohen*, 650 F.3d at 732 ("[E]xhaustion has not been required where the challenge is to the adequacy of the agency procedure itself.") (quotation omitted). Especially where "the allegation is that the 'administrative remedy furnishes no effective remedy at all.'" *Id.* (quoting *McCarthy v. Madigan*, 503 U.S. 140, 156 (1992)); *see* Compl. ¶ 186.

Defendants respond that the proper avenue for the Individual Plaintiffs is "to adjust status with an IJ in deportation or removal proceedings." Defs.' Br. at 18. But, again, Plaintiffs'

[8] Defendants also suggest that there has been no final agency action on Mr. Medina's application. Defs.' Br. at 11. Again, however, Plaintiffs challenge the TPS Policy Alert—which is indisputably final—rather than the denial of any individual adjustment applications.

challenge here is to the policy announced in the TPS Policy Alert, not to individual adjudicative decisions, so this argument is beside the point. The Individual Plaintiffs are not seeking review of their adjustment application denials, or asking this Court to *approve* their applications. *See* Compl. at 55 (prayer for relief). Plaintiffs seek only the standard APA remedy of vacatur, an order enjoining Defendants from continuing to operationalize their unlawful policy, and an order requiring Defendants to process their applications in accord with the prior policy.[9]

Even on its own terms though, Defendants' argument simply begs the question of what the INA requires. As Plaintiffs explain below, the Individual Plaintiffs executed their removal orders by departing the country lawfully, and so are not properly required to adjust status through removal proceedings. Instead, they are entitled to adjust status through USCIS, just like other non-citizens without pending orders of removal. *See infra* at 24-32. Moreover, reopening is neither available as a statutory right for the Individual Plaintiffs nor as a matter of the immigration court's discretion, so there are again no procedures to exhaust. *See supra* at 5.

The cases Defendants cite confirm that their arguments are irrelevant to the actual issues presented here. In particular, they rely on cases involving plaintiffs, who, unlike the Individual Plaintiffs here, were seeking direct review of adverse adjudicatory outcomes. *See Meza v. Cuccinelli*, 438 F. Supp. 3d 25, 28 (D.D.C. 2020) (describing case as one that "primarily argues that the agency's denial of his Application was arbitrary and capricious"); *Pinho v. Gonzalez*, 432 F.3d 193, 198 (3d Cir. 2005) (noting that the plaintiff sought "a declaratory judgment that the denial of his adjustment of status application was arbitrary, capricious, and unlawful" because USCIS had improperly found him ineligible to adjust status). Neither case involved a

[9] To the extent Plaintiffs seek to have USCIS "re-process" the denied applications, that is simply to spare those Plaintiffs the administrative hassle of re-filing form I-485 with USCIS.

challenge to an overarching agency policy preventing individuals from lawfully adjusting their status.

In contrast, *Jafarzadeh v. Duke* directly undermines their position. In *Jafarzadeh*, Judge Bates explained that "[a] claim is not 'of the type that Congress' expected to be funneled through the administrative review process if it is 'wholly collateral to a statute's review provisions,' is 'outside the agency's expertise,' or if following the administrative process would 'foreclose all meaningful judicial review.'" 270 F. Supp. 3d 296, 308 (D.D.C. 2017) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010)). Where "the type of claims plaintiffs raise are not just challenges to USCIS's ruling on [the plaintiff's adjustment] application—or to the immigration judge's or Board of Immigration Appeals' future ruling on [the plaintiff's] application—but rather are also to the allegedly unlawful processes and practices USCIS has employed in adjudicating such applications," the requirement for administrative exhaustion does not apply. *Id.*; *see also O.A.*, 404 F. Supp. 3d at 133 n.8 (rejecting exhaustion argument where plaintiffs asked the court to vacate a policy, not to review a removal order).

Persuasive to the Court was the fact—agreed upon by plaintiffs and the government—"that at no point in the administrative proceeding—whether before USCIS, the immigration judge or the Board of Immigration Appeals—would they be able to raise their constitutional and APA challenge" to the disputed practice. *Jafarzadeh*, 270 F. Supp. 3d at 310; *see also O.A.*, 404 F. Supp. 3d at 133 (noting that "an immigration judge lacks the authority to set aside a regulation promulgated by the Attorney General and the Secretary of Homeland Security").[10]

[10] Defendants here do not suggest otherwise, *see* Defs.' Br. at 17-20, and so relegation to the immigration court would serve to deny Plaintiffs the opportunity to even raise their APA, FVRA, or Constitutional claims. For this same reason, and also because, as explained *supra* at 5, moving to reopen is not an option for the Individual Plaintiffs, and those similarly situated, even if the Court were to find exhaustion applicable, that requirement should be waived as futile. *ASARCO, Inc. v. FERC*, 777 F.2d 764, 774 (D.C. Cir. 1985) (describing "the futility of seeking relief from the agency" as "one of the ordinary exceptions to exhaustion.").

That reasoning applies with the same force here. Plaintiffs should not have to try to reopen their underlying immigration cases when the entire premise of this lawsuit is that they need not reopen those cases to adjust. And it would be particularly Kafkaesque to force them to do so when their failure is a legal certainty, 85 Fed. Reg. at 81,591, and the immigration court would not even have the jurisdiction to consider Plaintiffs' claims against the TPS Policy Alert or issue any relief pertaining to the Alert.

**D. The INA does not strip this Court of jurisdiction over Plaintiffs' claims**

Finally, Defendants incorrectly contend that this Court lacks jurisdiction under several provisions of the INA. Specifically, Defendants argue that, because the Individual Plaintiffs remain "in proceedings" and subject to the exclusive jurisdiction of the immigration courts, their challenge to the TPS Policy Alert amounts to "a collateral attack" on their removal orders. Defs.' Br. at 20. Defendants again make the same mistake: the entire point is that, because Plaintiffs executed their removal orders, they are no longer in removal proceedings and need not challenge those orders. *See Madu v. U.S. Att'y Gen.*, 470 F.3d 1362, 1367 (11th Cir. 2006); *Kumarasamy v. Att'y Gen. of U.S.*, 453 F.3d 169, 172 (3d Cir. 2006), *as amended* (Aug. 4, 2006).

Even aside from that, this argument fails. Defendants principally rely on 8 U.S.C. § 1252(a)(5), which channels judicial review of removal orders to the courts of appeals, and *id.* § 1252(b)(9), which provides that review of any legal questions arising from a removal proceeding are available only through judicial review of a final order of removal. Neither applies. As Judge Moss recently explained in rejecting the very arguments Defendants now make: "§ 1252(a)(5) has no bearing" on a court's jurisdiction where the case does "not seek review of a removal order—or, indeed, of any decision or action taken in the course of a removal proceeding." *O.A.*, 404 F. Supp. 3d at 129. And § 1252(b)(9) does "not 'present a jurisdictional bar'" where a

plaintiff is not "asking for review" of a removal order; "challenging the decision to detain them in the first place or to seek removal"; or "challenging any part of the process by which their removability will be determined." *Id.*, 404 F. Supp. 3d. at 131 (discussing *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (plurality opinion)).

For these reasons, district courts may properly entertain "a facial challenge to the validity of a regulation of general applicability based on the administrative record generated in the rulemaking," *id.* at 128, like the one brought here. Judge Bates has thus rejected these same claims. *See Jafarzadeh*, 270 F. Supp. 3d at 309 (holding that a challenge to "a practice or procedure employed in making decisions" is not barred by § 1252).

The cases Defendants cite in support of their jurisdiction-stripping argument are inapposite. All of them involve plaintiffs or petitioners who sought *direct review* by a federal court of a benefit adjudication or other agency determination, which plainly would have called into question the validity of a removal order. *See Chen v. Rodriguez*, 200 F. Supp. 3d 174, 175, 181 (D.D.C. 2016) (challenge to "USCIS's administrative closure of [plaintiff's] adjustment application"); *Singh v. USCIS*, 878 F.3d 441, 443 (2d Cir. 2017) (challenge to USCIS decision declining to exercise "jurisdiction over Singh's application for an adjustment of his immigration status"); *Estrada v. Holder*, 604 F.3d 402, 404 (7th Cir. 2010) (challenging USCIS's decision declining to reopen an order rescinding his permanent residence); *Martinez v. Napolitano*, 704 F.3d 620, 621 (9th Cir. 2012) (action seeking direct review of BIA decision denying application for various forms of humanitarian relief); *Gonzalez-Alarcon v. Macias*, 884 F.3d 1266, 1268 (10th Cir. 2018) (habeas petitioner not allowed to seek direct petition for his release on the basis that his pending removal order is invalid).

As Defendants begrudgingly acknowledge, however, the Complaint "does not specifically request that the Court delve into the merits of their removal orders[.]" Defs.' Br. at 22 n.13. Indeed, Plaintiffs neither seek direct review of any adverse determination by USCIS, nor ask the Court to do anything that would call into question the legality of the Plaintiffs' removal orders. The jurisdiction stripping and channeling provisions cited by Defendants thus do not apply, and the Court has jurisdiction over this action.[11]

## II. Plaintiffs have stated a claim upon which relief may be granted

Plaintiffs have also plausibly alleged that the TPS Policy Alert is contrary to the INA (Count I); that it violates the APA's notice-and-comment requirement (Count III); that the official who promulgated it was serving unlawfully (Counts IV-VI); and that it was motivated by discriminatory animus against immigrants of color (Count VII).[12]

### A. Plaintiffs have stated a claim that the TPS Policy Alert is contrary to the INA (Count I)

To restate the basics, applicants may turn to USCIS to adjust status if they have no outstanding removal order, 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1), or if they are considered an "arriving alien," *id.* § 1.2. *See supra* at 4. The entire basis for Plaintiffs' statutory argument is

[11] Defendants also assert, in a footnote, that "the Court is also divested of jurisdiction pursuant to 8 U.S.C. [§] 1252(g)" because "[i]f USCIS re-adjudicated the Form I-485s and granted the applications, then this suit would prevent the Attorney General from executing the outstanding deportation orders against them, were TPS to no longer apply." Defs. Br. at 22 n.13. But courts have made clear that "the phrase 'arising from' does not sweep in every action or decision connected in any way with the removal process." *O.A.*, 404 F. Supp. 3d at 131 (discussing *Jennings*, 138 S. Ct. at 841 (plurality opinion)). Rather, "arising from" is properly read "to refer to just those three specific actions" enumerated in § 1252(g). *Jennings*, 138 S. Ct. at 841. Because Plaintiffs' claims "arise from" the enactment of the TPS Policy Alert, and not any of the actions mentioned in the text of § 1252(g)—*i.e.*, an "action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders," 8 U.S.C. § 1252(g)—that provision, too, does not strip this Court of jurisdiction over Plaintiffs' claims.

[12] Defendants do not dispute that Plaintiffs have stated a claim with respect to Count II, which alleges that Defendants acted arbitrarily and capriciously in promulgating the TPS Policy Alert, and so any argument on that front has been waived. *Davis v. Bud & Papa, Inc.*, 885 F. Supp. 2d 85, 90 (D.D.C. 2012) ("[I]t is a well-settled prudential doctrine that courts generally will not entertain new arguments first raised in a reply brief.").

that TPS beneficiaries who travel abroad execute—*i.e.*, eliminate—their removal orders, not that they are somehow "arriving aliens." Defendants admit that "Plaintiffs do not state or argue that they are 'arriving aliens' in their complaint," but nevertheless insist that "the fact that [Plaintiffs'] seek adjustment of status from USCIS rather than the IJ implies as much." Defs.' Br. at 24. But that is wrong. As laid out in the Complaint, each seeks adjustment through USCIS *not* because they qualify as "arriving aliens," but because, at some point after being ordered removed, each departed from the United States, a move that USCIS has historically deemed, pursuant to 8 U.S.C. § 1101(g), to execute the order of removal and thereby vest USCIS with exclusive jurisdiction. *See* Compl. ¶ 101.

Many of Defendants' responses founder on this fundamental misunderstanding. In any event, their argument fails to grapple with the text of the INA: as Plaintiffs explain in the Complaint, the TPS Policy Alert unlawfully conflicts with 8 U.S.C. § 1101(g), which unambiguously provides that one who has been ordered removed and then departs "shall be considered to have been deported or removed." Compl. ¶ 12. The TPS Policy Alert therefore denies TPS beneficiaries with removal orders the legally required effect of their departure. *See id.* ¶¶ 199-203. Defendants' responses are belied by the statutory text, history, and long-standing agency understanding of MTINA. Plaintiff have therefore stated a claim under the INA and APA.

***1. The TPS Policy Alert contradicts the unambiguous language of the INA***

By its plain terms, the INA mandates that, when an individual subject to a removal order "le[aves] the United States," they "shall be considered to have been … removed." 8 U.S.C. § 1101(g); *see Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (explaining that the term "shall" is "mandatory, not precatory"). Thus, "[t]he plain statutory text clearly envisions that any departure is sufficient to execute a removal order." *Nicusor-Remus v. Sessions*, 902 F.3d 895,

899 (9th Cir. 2018); *see also Mrvica v. Esperdy*, 376 U.S. 560, 563 (1964) (noting that there is "no doubt" under the statute that a departure after a deportation order executes the order); *Mansour v. Gonzales*, 470 F.3d 1194, 1199 (6th Cir. 2006) (brief, voluntary trip abroad executed removal order).

Contrary to Defendants' suggestion, *see* Defs.' Br. at 24, that rule continues to govern even when the noncitizen who is subject to the removal order is a TPS beneficiary. The statutory text does not distinguish between types of removal orders or categories of noncitizens. To the contrary, the statute clarifies that an order is deemed executed "irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed." 8 U.S.C. § 1101(g). USCIS's predecessor, INS, recognized as much immediately after TPS was enacted, directing that "a TPS alien who departs the United States while a deportation order is in effect carries out his or her own deportation." Memorandum, *Advanced Parole for TPS Eligible Aliens*, 1991 WL 1185160, at *3. USCIS continued to express this understanding for at least the next 27 years. *See, e.g.*, *Matter of R-D-S-B-*, 2018 WL 5981636, at *2 (concluding that a TPS beneficiary's "departure executed his final order of removal"); *In re* [Name redacted], 2013 WL 5504876, at *3 (same).

Nevertheless, the TPS Policy Alert purports to "[c]larif[y] that TPS beneficiaries who had outstanding, unexecuted final removal orders at the time of departure, remain TPS beneficiaries who continue to have outstanding, unexecuted final removal orders upon lawful return." TPS Policy Alert at 2. That "clarification" cannot be squared with Section 1101(g).

***2. MTINA does not support the TPS Policy Alert***

In enacting the TPS Policy Alert, Defendants appear to have relied on Section 304(c) of MTINA, contained in a note to 8 U.S.C. § 1254a, which provides that a TPS beneficiary who travels on advance parole "shall be inspected and admitted in the same *immigration status* the

alien had at the time of departure." MTINA § 304(c)(1)(A) (emphasis added); *see* Defs.' Br. at 24-25. Rather than giving "immigration status" its ordinary meaning, Defendants interpret it to encompass all "circumstances" pertaining to an immigrant, TPS Policy Alert at 1, which means, in Defendants' view, that "when Plaintiffs returned to the United States pursuant to the grant of advance parole, they remained ... subject to a final order of deportation or removal[.]" Defs.' Br. at 25. That reading of MTINA pushes the statute past the breaking point.

The term "status," as it is used in MTINA—a statute amending the law creating the Temporary Protected *Status* program—refers to a TPS beneficiary's status as a TPS *recipient. See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citation omitted) ("a statute is to be read as a whole … since the meaning of statutory language, plain or not, depends on context"); *Dada v. Mukasey*, 554 U.S. 1, 16 (2008) ("In reading a statute we must not 'look merely to a particular clause,' but consider 'in connection with it the whole statute.'") (quoting *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974)). That common-sense interpretation is consistent with how the term "status" is used throughout immigration law—*see, e.g.*, 8 U.S.C. § 1184 (differentiating between "immigrant" and "nonimmigrant status")—and with how courts have understood it.

In *Gomez v. Lynch*, for example, the Fifth Circuit invoked the "canon against surplusage" to reject the government's argument that a noncitizen who had traveled abroad and been "admitted" upon his lawful return would revert to a status of "'present in the United States without being admitted or paroled'" once their status as a temporary resident lapsed. 831 F.3d 652, 658-60 & n.11 (5th Cir. 2016). "Status," the Fifth Circuit found, relates only to a noncitizen's "permission to be present." *Id.* at 658-59 & n.10. While "specific characteristics"—such as "lack of admission" or "work authorization"—may lead to "various subsidiary descriptions within th[e] categories" of immigrant status or nonimmigrant status, they are not

part of the noncitizen's *status*. *Id.* ("[L]ack of admission can *cause* … unlawful status, but it is not *part* of that unlawful status."); *see In Re Blancas–Lara*, 23 I. & N. Dec. 458, 460 (BIA 2002) (describing "status" as a "term of art" that "denotes someone who possesses a certain legal standing" as an immigrant or nonimmigrant). In other words, "circumstances" and "incidents" of status are not an immigrant's status, as that term is used in immigration law.

Defendants' contrary and expansive understanding of "status" would mean that MTINA implicitly repealed Section 1101(g)'s explicit statement that one who has been "ordered deported or removed" and "has left the United States[] shall be considered to have been deported or removed," through a technical amendment to a different subchapter. But it is well-established that "repeals by implication are not favored." *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (quotation marks omitted). Rather, "the intention of the legislature to repeal must be clear and manifest." *TVA v. Hill*, 437 U.S. 153, 189 (1978) (quotation omitted). And it would be surpassing strange in this context, since MTINA was enacted, as its name implies, to make only "certain technical corrections," MTINA, Pub. L. 102-232, 105 Stat. at 1733 (preamble), so that the Immigration Act of 1990's substantive reforms would be "more logical, easier to implement, and *fairer* for all," *see* 137 Cong. Rec. 34,791 (1991) (emphasis added).[13]

Moreover, those technical corrections were intended to ensure that TPS beneficiaries, upon their return, were *not* deprived of procedural protections they would have enjoyed prior to their departure. In this regard, the history surrounding MTINA's passage is instructive. When

[13] *See also* H.R. Rep. No. 102-383, at 2 (1991) ("In light of the scope and complexity of the 1990 [Immigration] Act … a number of technical errors in the [1990 Immigration Act] have come to [our] attention …. H.R. 3670 is principally designed to correct those errors"); *Nat'l Ass'n of Mfrs. v. U.S. Dep't of Labor*, No. 95-cv-0715, 1996 WL 420868, at *4 (D.D.C. July 22, 1996) ("In order to correct errors that Congress perceived in the [Immigration Act of 1990] … Congress passed the Miscellaneous and Technical Immigration and Naturalization Amendments[.]").

INS first implemented TPS, it implemented the TPS statute's travel benefit through invocation of its "advance parole" authority to consent to travel for TPS beneficiaries. 8 U.S.C. § 1254a(f)(3); 8 C.F.R. § 244.15; *see* Memorandum, *Advanced Parole for TPS Eligible Aliens*, 1991 WL 1185160, at *2. The TPS statute did not compel INS to look to its "advance parole" authority for this purpose, and the choice to do so by INS was consequential for TPS beneficiaries because "advance parole" is a form of advance travel authorization that comes with limitations. For instance, when seeking to re-enter the country pursuant to a grant of "advance parole," the TPS beneficiary would be permitted to physically re-enter but was not considered legally "admitted" and was instead viewed, in the eyes of the law, as continuing to stand at the border. *Id.* (citing 8 U.S.C. § 1182(d)(5)(A)). This legal fiction rendered the TPS beneficiary subject to "exclusion" proceedings upon re-entrance, with fewer procedural protections, rather than the deportation proceedings the beneficiary would have been subject to prior to their departure. *See id.*

In response to this narrowing of procedural rights, Congress enacted MTINA § 304(c)(1), which amended, in relevant part, the portion of the Immigration Act of 1990 governing travel authorization for TPS beneficiaries. By providing that a TPS beneficiary "*shall be inspected and admitted* in the same immigration status the alien had at the time of departure," MTINA § 304(c)(1) (emphasis added), it ensured that returning TPS beneficiaries would be "inspected and admitted" and thus protected against "exclusion" proceedings upon their return. *Id.*

Two months after MTINA's enactment, INS signaled that it had received Congress's message, describing it as "a conscious choice made by Congress to preserve certain deportation and exclusion rights for TPS aliens who have been granted authorization to travel." Memorandum from Grover Joseph Rees III, Gen. Couns., INS to James A. Puleo, Assoc. Comm'r, Examinations, INS, *Travel Authorization for Aliens Granted TPS*, Genco Op. No. 92-

10, 1992 WL 1369349, at *1 (Feb. 27, 1992). INS further acknowledged that "Congress here *did not intend that authorized travel abroad be treated the same way as the grant of advance parole*," and recommended that changes to the travel authorization application (Form I-131) be made accordingly. *Id.* (emphasis added).[14] INS concluded that "TPS (and family unity) aliens granted authorization 'to travel' must be readmitted to the United States in the same immigration status they had at the time of departure," but gave no indication that it thought MTINA altered the ability of a TPS beneficiary to execute a removal order by traveling. *Id.*

INS's General Counsel further confirmed this contemporary understanding through a 1993 opinion that addressed whether INS could "approve travel authorization for a TPS registrant who has been issued an order to show cause, without first cancelling the order to show cause." Memorandum from Paul W. Virtue, Acting Gen. Couns., INS to Lawrence J. Weinig, Acting Assoc. Comm'r, Examinations, INS, *Travel Permission for Temporary Protect Status (TPS) Registrants*, Genco Op. No. 93-41, 1993 WL 1503998, at *1 (Aug. 4, 1993). In concluding that travel could be authorized for such an individual, INS asserted that the individual would "remain subject to deportation" proceedings upon their return. *Id.* Because only a show cause order, but no final deportation order, had been granted to this individual prior to their departure, Section 1101(g) would have no role to play; there was no final order to execute through departure. Rather, this opinion merely reflects the goal of MTINA: to ensure that a TPS beneficiary in this situation would receive the stronger procedural protections of a deportation proceeding upon their return, as opposed to receiving the limited protections of an exclusion proceeding.

[14] Despite this recognition, INS and now USCIS have continued to authorize travel under TPS "pursuant to the Service's advance parole provisions." 8 C.F.R. § 244.15(a).

INS's contemporaneous understanding endured for more than two decades, during which time, USCIS continued to treat a TPS beneficiary's departure as executing a removal order. *See, e.g.*, *Matter of R-D-S-B-*, 2018 WL 5981636, at *2 (concluding that TPS recipient's "departure executed his final order of removal"). "Such a longstanding, uniform construction by the agency charged with administration of [a particular Act], particularly when it involves a contemporaneous construction of the Act by the officials charged with the responsibility of setting its machinery in motion, is entitled to great respect." *Chemehuevi Tribe of Indians v. Fed. Power Comm'n*, 420 U.S. 395, 409-10 (1975) (citations omitted).

The cases Defendants cite do not suggest otherwise. Defs.' Br. at 24-26. In each of the three unpublished opinions Defendants cite from other circuits, the plaintiff offered the theory Defendants would apparently rather be arguing against: that re-entrance under a grant of advance parole rendered them an "arriving alien." *See Gonzalez v. Mayorkas*, No. 1:13-CV-1230, 2014 WL 585863, at *5 (E.D. Va. Feb. 12, 2014) (rejecting claim that petitioner "is properly classified as an arriving alien paroled into the United States"), *aff'd sub nom. Gonzalez v. Zannotti*, 585 F. App'x 130 (4th Cir. 2014); *Espinosa*, 2019 WL 6682836, at *2 n. 2 (same); *Pineda v. Wolf*, No. 19-cv-11201, 2020 WL 4559936, at *2 (D. Mass. May 13, 2020) (same). But the question before the Court is whether Plaintiffs have stated a claim that the TPS Policy Alert, by instructing that a removal order will not be executed by travel abroad, runs contrary to the INA, 8 U.S.C. § 1101(g). None of the cases Defendants cite address that question.

In sum, Defendants deviated from their longstanding practice by reinterpreting a technical amendment intended to protect the rights of TPS beneficiaries to instead contract the rights of TPS beneficiaries by implicitly repealing another longstanding statutory provision. That

makes no sense—and there is no indication from the text, structure, or legislative history of MTINA that it is what Congress intended. Plaintiffs have therefore stated a claim under the INA.

### B. Plaintiffs have stated a claim that Defendants unlawfully enacted the TPS Policy Alert without notice and comment (Count III)

Plaintiffs have plausibly alleged that the TPS Policy Alert unlawfully established a "legislative rule" without notice and comment. Compl. ¶¶ 210-14. Unlike so-called "interpretative rules," "legislative rules" are those that "'have the force and effect of law and are … accorded that weight in the adjudicatory process.'" *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015) (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)). Legislative rules "supplement[] a statute, adopt[] a new position inconsistent with existing regulations, or otherwise effect[] a substantive change in existing law or policy." *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014); *Huashan Zhang v. USCIS*, 344 F. Supp. 3d 32, 58 (D.D.C. 2018) ("It is well-settled that a policy that adds a requirement not found in the relevant regulation is a substantive rule that is invalid unless promulgated after notice and comment."), *appeal dismissed*, No. 19-5021, 2019 WL 6218266 (D.C. Cir. Nov. 15, 2019), *aff'd*, 978 F.3d 1314 (D.C. Cir. 2020). The TPS Policy Alert is a legislative rule under this standard.

The TPS Policy Alert attempts to supplement—really, to undermine—Section 1101(g)'s unambiguous language governing the effect of travel on an existing removal order. It announces a new position for Defendants that deviates from their previously held view that travel executes an existing removal order, conferring jurisdiction over a subsequent application for adjustment on USCIS. *See* Compl. ¶¶ 99-103; *see also* Memorandum, *Advanced Parole for TPS Eligible Aliens*, 1991 WL 1185160, at *3. Those are the hallmarks of a legislative rule. *See Mendoza*, 754 F.3d at 1021. It further creates an irreconcilable conflict with both Section 1101(g) and MTINA, *see supra* 24-32, which belies Defendants' assertion that the TPS Policy Alert "merely provides

'crisper and more detailed lines than the authority being interpreted.'" Defs.' Br. at 29 (quoting *Funeral Consumer Alliance v. FTC*, 481 F. 3d 860, 863 (D.C. Cir. 2007)).

The TPS Policy Alert also plainly "change[d] the rules" mid-game. *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003). Relying on the prior legal scheme, TPS beneficiaries, like the Individual Plaintiffs, expended time and money navigating the adjustment of status process, and even submitting applications to USCIS *before* the TPS Policy Alert was issued. *See* Compl. ¶¶ 28-31, 34-37, 40-43, 47-50, 53-56, 59-61, 65-67. That effort was wasted once Defendants enacted the TPS Policy Alert. The rules have also been changed for advocates like CARECEN, which structured its approach to serving TPS beneficiaries—an important constituency for its organizational mission—in reliance on the understanding that it could help TPS beneficiaries with removal orders apply to adjust their status through USCIS by assisting them with the process of obtaining authorization to travel. *See id.* ¶¶ 163, 193-98.

Notwithstanding the effects of the TPS Policy Alert, Defendants insist it is not legislative because it "updates the USCIS Policy Manual." Defs.' Br. at 27. But their characterization of the rule is hardly dispositive. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (looking to substance of guidance document, and not agency's characterization of it, to find that it constituted a legislative rule). Agencies cannot evade notice and comment by announcing their changes in documents less formal than published regulations; that "would render the requirements of § 553 basically superfluous in legislative rulemaking by permitting agencies to alter their requirements for affected public members at will." *NFPRHA v. Sullivan*, 979 F.2d 227, 231-32 (D.C. Cir. 1992). And courts have also found changes to similar agency policy manuals to constitute legislative rules. *See, e.g.*, *Baltimore v. Trump*, 416 F. Supp. 3d 452, 507 (D. Md. 2019) (State Department's Foreign Affairs Manual governing consular officers).

Defendants also insist that the TPS Policy Alert is not a legislative rule because it does not remove the discretion of USCIS officials to make adjudicatory decisions. Defs.' Br. at 29. But the TPS Policy Alert establishes a policy that "is controlling and supersedes any prior guidance on the topic." TPS Policy Alert at 1. Plaintiffs have also alleged that it sets down a new, jurisdictional rule that absolutely bars USCIS from adjudicating applications for adjustment of status where the applicant is, like the Individual Plaintiffs, a TPS beneficiary who has a final removal order and has traveled abroad with USCIS's consent. *See* Compl. ¶¶ 99-103; *see also id.* ¶¶ 29-31, 35-37, 41-43, 48-50, 54-56, 60-61, 66-67. After the issuance of the Policy Alert, whether jurisdiction over applications for adjustment of status lies exclusively with USCIS or exclusively with EOIR is a matter governed by bright line rules, not discretion. *See* 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1)(i). If Defendants wish to cast the TPS Policy Alert as non-binding, they will need something more definitive than general language in the USCIS Policy Manual indicating that USCIS officials exercise discretion in their adjudications. *See* Defs.' Br. at 28; *see also Appalachian Power Co.*, 208 F.3d at 1023 (finding guidance document that "commands," "requires," "orders," "dictates," and gives "marching orders" was legislative rule).

To the extent there is any doubt about whether the TPS Policy Alert announces a new legislative rule that constrains the discretion of USCIS officers, that presents a question better suited to summary judgment after production of the administrative record, which may well cast light on the Defendants' understanding of the effect of the Policy Alert. At this phase, where Plaintiffs' well-pleaded factual allegations must be taken as true, *Iqbal*, 556 U.S. at 678, Plaintiffs have plausibly alleged that the TPS Policy Alert imposes new requirements and obligations that constrain the discretion of USCIS officials. Nothing more is required.

### C. Mr. Cuccinelli's appointment is unlawful (Counts IV, V, VI)

Plaintiffs have plausibly alleged that Mr. Cuccinelli was not lawfully appointed as acting Director of USCIS, and so any directives he issued in that capacity, including the TPS Policy Alert, are void. The FVRA, enacted in 1998, provides the President with limited authority to appoint acting officials while preserving the Senate's advice and consent power under the Appointments Clause of the Constitution—a power that serves as "a critical 'structural safeguard [] of the constitutional scheme.'" *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017) (quoting *Edmond v. United States*, 520 U.S. 651, 659 (1997)).

The FVRA permits an individual to act in an office requiring Presidential nomination and Senate confirmation (a so-called "PAS" office) under certain, specified circumstances. As a default rule, the FVRA provides that "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily." 5 U.S.C. § 3345(a)(1). However, the President may select another individual if he or she either already serves in a PAS office, *id.* § 3345(a)(2), or if, during the year prior to the vacancy, he or she served as a senior career official, *id.* § 3345(a)(3). These "carefully calibrated limits," *English v. Trump*, 279 F. Supp. 3d 307, 312 (D.D.C. 2018), require the President to select someone who "has already passed the tests of Senate confirmation and presidential appointment" or possesses "experience and seniority," *L.M.-M.*, 442 F. Supp. 3d at 28, if he wishes to override the FVRA's default rule.

Mr. Cuccinelli, however, could not have become the acting Director of USCIS through any of these enumerated paths. He had not been serving in a PAS office, *see* 5 U.S.C. § 3345(a)(2), and had not been employed by USCIS (or, indeed, any other DHS component) in the year prior to the vacancy, *see id.* § 3345(a)(3). Compl. ¶ 135. Nor was Mr. Cuccinelli the first assistant at the time the vacancy opened. *See id.* ¶ 128. To the contrary, the Deputy Director of USCIS appears to have been designated as the first assistant to the Director since the office's

creation. At the time, the last confirmed Director of USCIS, Lee Francis Cissna, was forced to resign, Mark Koumans was serving as Deputy Director. *See L.M.-M.*, 442 F. Supp. 3d at 10; Compl. ¶¶ 126-28, 135.

To appoint Mr. Cuccinelli to serve as acting Director, Defendants attempted an end-run around the FVRA's requirements. After forcing out Mr. Cissna, then-acting Secretary of Homeland Security Kevin McAleenan took the unprecedented steps of creating an entirely new position of Principal Deputy Director, designating the holder of that office as first assistant to the Director, and appointing Mr. Cuccinelli as Principal Deputy Director. The orders documenting these steps show that they took place on the same day Defendants announced Mr. Cuccinelli's appointment as acting Director and would lapse as soon as a new Director was confirmed. *See L.M.-M.*, 442 F. Supp. 3d at 10; Compl. ¶¶ 129-32; ECF Nos. 30-4, 30-5.

This extraordinary, good-for-one-ride-only attempt to manipulate the structure of USCIS just to install Mr. Cuccinelli broke the law in at least two major ways. ***First***, as Judge Moss held in March, in a decision that the government ultimately decided not to appeal, Mr. "Cuccinelli was not lawfully appointed to serve as acting Director" because he never qualified as a first assistant within the meaning of the FVRA. *L.M.-M.*, 442 F. Supp. 3d at 9. ***Second***, multiple courts have also held that acting Secretary McAleenan was unlawfully appointed—meaning that he lacked the authority to appoint Mr. Cuccinelli in the first place. We discuss each point in turn.

***1. Mr. Cuccinelli did not qualify as a first assistant***

Judge Moss's thorough decision in *L.M.-M.* alone establishes that Plaintiffs have stated a plausible FVRA claim. In *L.M.-M.*, Judge Moss concluded that Mr. "Cuccinelli's appointment fail[ed] to comply with the FVRA" because he "never did and never will serve in a subordinate role—that is, as an 'assistant'—to any other USCIS official." 442 F. Supp. 3d at 24. "For this

reason alone, [the government's] contention that his appointment satisfies the FVRA cannot be squared with the text, structure, or purpose of the FVRA." *Id.* at 24-25.

Judge Moss reasoned that "under any plausible construction," the term first assistant "comprehends a role that is, in some manner and at some time, subordinate to the principal." *Id.* at 25. Applying that "commonsense understanding of the meaning of the default provision, [Mr.] Cuccinelli d[id] not qualify as a 'first assistant' because he was assigned the role of principal on day-one and, by design, he never ha[d] served and never will serve 'in a subordinate capacity' to any other official at USCIS." *Id.* at 26. "[L]abels—without *any* substance—cannot satisfy the FVRA's default rule under any plausible reading of the statute." *Id.*

Judge Moss also concluded that "[n]othing in the historical record of the Vacancies Act" supported the government's view. *Id.* at 27. The government "failed to identify a single example" of an acting official who was appointed as a first assistant to a PAS office after it became vacant. *Id.* at 27-28. Judge Moss therefore found "no evidence" that "Congress or the Executive Branch imagine[d] that an agency could create a new position after a vacancy arose; … treat that new position as the "first assistant" to the vacant office; and … further specify that all would return to its original state once the PAS vacancy was filled." *Id.* at 28.

Finally, Judge Moss determined that "[t]he structure and purpose of the FVRA further confirm that Cuccinelli was not lawfully designated to serve as the acting Director of USCIS." *Id.* (citation omitted). The FVRA allows the President, and the President alone, to choose someone other than the first assistant "*as long as* that person is either a Senate-confirmed appointee … or an employee within the same agency." *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 11 (D.C. Cir. 2019) (emphasis added) (citation omitted). But the government's "reading of the FVRA," under which a subordinate official can manipulate

internal lines of succession to appoint whoever they wish, "would decimate this carefully crafted framework." *L.M.-M.*, 442 F. Supp. 3d at 28. "The President would be relieved of responsibility and accountability for selecting acting officials, and the universe of those eligible to serve in an acting capacity would be vastly expanded," *id.*, rendering the FVRA nugatory.

Defendants do not even attempt to distinguish *L.M.-M.* Instead, they present multiple arguments that were either explicitly or implicitly rejected by Judge Moss, and which provide no reason for this Court to reach a different conclusion.

To start, Defendants repeatedly assert that the Secretary of Homeland Security has complete discretion to name a first assistant to the Director of USCIS because the statute itself does not identify a first assistant. Defs.' Br. at 31, 35. But Defendants have it backwards. "Because the FVRA does not provide a statutory definition of the phrase 'first assistant,' … the Court must construe that phrase 'in accordance with its ordinary or natural meaning.'" *L.M.-M.*, 442 F. Supp. 3d. at 25 (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)). As explained above, the ordinary meaning of "first assistant" refers to "the senior or principal assistant to the official or office at issue," and does not encompass an official appointed for the sole purpose of ascending to the acting role. *Id.* at 26. Defendants' insistence that Judge Moss's "conclusion finds no support in the text of the FVRA," Defs.' Br. at 35, is thus wrong (and belied by their decision not to appeal it).

Defendants also mistakenly assume that Congress intended to permit officials like Mr. Cuccinelli because it separately imposed a "length of service" requirement on acting officials nominated to fill the office on a permanent basis. *Id.* (quotation omitted). But Subsections (a) and (b) of Section 3345 serve different roles. Subsection (a) limits who may serve as an acting official, and Subsection (b) imposes heightened requirements for those who serve as "both the

nominee and the acting officer." S. Rep. No. 105-250, at 13 (1998). Moreover, even if Defendants were right that Subsection (a) permits "brief-serving" first assistants, "that would not solve Defendants' difficulty in this case because Cuccinelli was never and will never be the 'assistant' to anyone or any office at USCIS—before or after the vacancy arose." *L.M.-M.*, 442 F. Supp. 3d at 27. "[R]espect[ing] the scheme adopted by Congress," Defs.' Br. at 35, requires giving meaningful content to the words that it chose.

Defendants' remaining arguments are directed at whether the FVRA permits so-called "post-vacancy first assistants," *see id*. at 31-32—*i.e.*, first assistants who are appointed after the vacancy arises. Such appointments conflict with the text, structure, and purpose of Section 3345, which allows only the existing first assistant to ascend to fill a vacancy unless the President selects an alternative from a limited set of candidates. *See supra* at 35-38. Judge Moss nonetheless declined to address this argument because he concluded that Mr. Cuccinelli's failure to ever serve as a valid first assistant at all provided "a more fundamental and clear-cut reason" for holding him to have been ineligible to serve as acting Director, *L.M.-M.*, 442 F. Supp. 3d at 24, and this Court need not reach it either to deny Defendants' motion to dismiss.

Defendants' responses have no bearing on Judge Moss's reasoning, and are misguided on their own terms. Defendants argue that an individual need only serve as the first assistant "to the office," and not the particular officeholder who departed, but "even under Defendants' reading of the statute, Cuccinelli [did] not hold an office that was or that ever will serve as the 'first assistant' to the *office* of the USCIS Director." *L.M.-M.*, 442 F. Supp. 3d at 26. Moreover, the law's sponsor explained that "to the office" was intended to "depersonalize the first assistant" so that if a designated "acting officer dies or … resigns," the original first assistant would remain eligible; it "[was] not intended to alter case law on the meaning of the term 'first assistant.'" 144

Cong. Rec. S12,822 (daily ed. Oct. 21, 1998); *see also* S. Rep. No. 105-250, at 12 (1998) (explaining that the bill would continue "the practice under current law").

Defendants also baldly assert that the Executive Branch "routinely relies" on post-vacancy first assistants. Defs.' Br. at 32 & n.20. That claim is unsupported. In *L.M.-M.*, "Defendants failed to identify a single example of a post-vacancy first assistant serving in an acting capacity prior to enactment of the FVRA," which "casts some doubt on whether Congress intended the phrase 'first assistant' to encompass those appointed to the first-assistant position after the vacancy arose." *L.M.-M.*, 442 F. Supp. 3d at 27-28. "But this case goes far beyond that scenario and pushes doubt to disbelief," because "[t]here is no evidence" that Congress imagined that the head of a department could rearrange internal succession orders for the sole purpose of elevating an acting official who had never previously served in the department at all. *Id.* at 28.

And Defendants insist that prohibiting post-vacancy first assistants "would create redundancies within the FVRA itself, particularly as to § 3345(b)(1)," which separately imposes a length of tenure requirement on acting officials who are also nominated to the position on a permanent basis. Defs.' Br. at 33. Defendants' argument was eliminated by *Southwest General*, which held that Subsection (b)(1) also applies to appointees under Subsection (a)(2) and (a)(3), and is therefore not superfluous. 137 S. Ct. at 938. But even if Defendants were right about the permissibility of post-vacancy first assistants, it would again have no bearing on the essential fact that Mr. Cuccinelli "was never and will never be the 'assistant' to anyone or any office at USCIS." *L.M.-M.*, 442 F. Supp. 3d at 27.

#### *2. Acting Secretary McAleenan lacked the authority to appoint Mr. Cuccinelli as Principal Deputy Director*

Separately, because Mr. McAleenan unlawfully assumed the role of acting Secretary of Homeland Security, he lacked any authority to engage in the procedural machinations used to

appoint Mr. Cuccinelli. At least *four* courts and the Government Accountability Office ("GAO") have recently concluded that when Mr. "McAleenan assumed the position of Acting Secretary, he was *not* next in line" under the operative Homeland Security Act succession order and therefore "assumed the role of Acting Secretary without lawful authority." *CASA de Md., Inc. v. Wolf*, --- F. Supp. 3d ----, 2020 WL 5500165, at *21 (D. Md. 2020); *see also La Clinica de la Raza v. Trump*, --- F. Supp. 3d ----, 2020 WL 6940934, at *14 (N.D. Cal. 2020); *Batalla Vidal v. Wolf*, --- F. Supp. 3d ----, 2020 WL 6695076, at *8 (E.D.N.Y. 2020); *Immigrant Legal Res. Ctr.* ("*ILRC*") *v. Wolf*, --- F. Supp. 3d ----, 2020 WL 5798269, at *8 (N.D. Cal. 2020); GAO, B-331650, *Decision: Matter of Department of Homeland Security* ("GAO Decision") (Aug. 14, 2020), https://perma.cc/TU6G-YCBD.

Defendants' error arose from an order issued by then-Secretary Kirstjen Nielsen in April 2019 amending the Department of Homeland Security's delegation order. At the time, DHS Delegation No. 106 "set two separate tracks for delegating authority to an Acting Secretary in the event that the office of the Secretary became vacant," depending on whether (1) the Secretary died, resigned, or became unable to serve (governed by Executive Order 13,753), or instead (2) was unavailable to act during an emergency (governed by "Annex A"). *Batalla Vidal*, 2020 WL 6695076, at *2. Then-Secretary Nielsen elected to amend the second track to move up the Commissioner of Customs and Border Protection, Mr. McAleenan, but left the first intact. *Id.* at *3. When she resigned her position, the first track therefore controlled—meaning that the Director of the Cybersecurity and Infrastructure Security Agency remained next in line, not Mr. McAleenan. *Id.*; *see also* Compl. ¶¶ 144-50.

The crux of Defendants' response is to look at what then-Secretary Nielsen said, not what she did. What she did is abundantly clear: she amended Annex A "by striking the text of Annex

A in its entirety" and inserting a different order of delegation. ECF No. 30-6 at 2. Defendants nonetheless point to the fact that her order states that she "intended to designate an order of succession"; that delegation orders are different from succession orders; and that her understanding of what she intended to accomplish by enacting the April 2019 order controls over the revised delegation order itself. Defs.' Br. at 37-39. In other words, Defendants "urge[] the court to ignore official agency policy documents and invalidate the plain text of the April Delegation because it does not comport with [then-Secretary Nielsen's] supposed intent." *Batalla Vidal*, 2020 WL 6695076, at *9; *see also CASA de Md.*, 2020 WL 5500165, at *20 ("The Government counters, essentially, that Delegation Order 00106 does not mean what it says.").

Each of these arguments runs aground on the plain text of the April 2019 order itself, as multiple courts have explained. "On the plain text, Secretary Nielsen amended the order of officials in Annex A but did nothing to change when Annex A applied," and the Court should "credit[] the text of the law over *ex post* explanations." *Batalla Vidal*, 2020 WL 6695076, at *9. "Had Secretary Nielsen intended to modify the order of succession applicable in case of the Secretary's death, resignation, or inability to perform the functions of the Office, then her order could have so stated." *La Clinica*, 2020 WL 6940934, at *14. Indeed, Mr. McAleenan himself later amended the Department's delegation order to provide that Annex A controls even when the Secretary dies, resigns, or is unable to serve, which "reinforces the conclusion that at the time of Nielsen's resignation, Executive Order 13753 governed the order of succession." *Id.*; *see also ILRC*, 2020 WL 5798269, at *8. Under that order, Mr. McAleenan was not next in line.

By extension, those who were installed within the Department pursuant to Mr. McAleenan's purported authority—like Mr. Cuccinelli—similarly lacked authority. *See CASA de Md.*, 2020 WL 5500165, at *23 (reasoning that Mr. "McAleenan's appointment was invalid" so

he also "lacked the authority to amend the order of succession" to install Secretary Wolf); *ILRC*, 2020 WL 5798269, at *8; *La Clinica*, 2020 WL 4569462, at *14; *see also* GAO Decision. To use Defendants' terms, Mr. McAleenan lacked the power to "create the role of Principal Deputy Director and to amend the DHS order of succession to set the Principal Deputy Director as first assistant to the Director." Defs.' Br. at 30. Thus, Mr. Cuccinelli was never lawfully appointed as Principal Deputy Director, and so could not ascend to the position of acting Director even if that position qualified as the first assistant to the Director. Plaintiffs have therefore stated a claim under the FVRA, and by extension, plausible Appointments Clause (Count V) and *ultra vires* (Count VI) claims.[15]

### D. Plaintiffs have stated a claim under the Equal Protection guarantee of the Fifth Amendment (Count VII)

Finally, Plaintiffs have plausibly alleged that the TPS Policy Alert was motivated by discriminatory animus in violation of Equal Protection. A plaintiff establishes an Equal Protection violation against a facially neutral policy by showing that "invidious discriminatory purpose was a motivating factor." *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).[16] Any deference afforded a facially neutral law is washed away "[w]hen there is … proof that a discriminatory purpose has been a motivating factor in the decision[.]" *Id.* at 265-66. Evidence of animus thereby shifts the burden "to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

[15] Because these legal violations are sufficient to state a claim, the Court need not address other theories pleaded in the Complaint concerning Mr. Cuccinelli's appointment, including Plaintiffs' arguments about the manner in which the previous Director vacated his position, the manner in which the orders effectuating Mr. Cuccinelli's appointment were documented, and Defendants' broader pattern of violating the FVRA. *See* Compl. ¶¶ 217-18; Defs.' Br. at 33-35. The Court can reject Defendants' motion without addressing these issues.

[16] Courts have found *Arlington Heights*, and not rational basis, to provide the appropriate standard of review in cases like this where there is "the absence of national security concerns and the presence of foreign nationals in the United States." *See NAACP v. DHS*, 364 F. Supp. 3d 568, 576 (D. Md. 2019).

Here, Plaintiffs have thoroughly alleged that racial animus was a motivating factor in the TPS Policy Alert's enactment. *See* Compl. ¶¶ 14, 164, 170-79.

Among other things, "President Trump has questioned why the United States would grant immigration protection, including under TPS, for individuals from countries the President has described as 'shithole countries,' such as El Salvador, Haiti, and certain African nations." *Id.* ¶ 171. Indeed, these very statements have been taken by multiple other district courts as "sufficient to allege plausibly that a discriminatory purpose was a motivating factor" in Defendants' policies concerning TPS writ large. *See, e.g.*, *Centro Presente v. DHS*, 332 F. Supp. 3d 393, 415 (D. Mass. 2018); *Saget v. Trump*, 345 F. Supp. 3d 287, 303 (E.D.N.Y. 2018). These comments concerned rescission of the TPS program altogether, but it is at least plausible that such animus similarly infects the TPS Policy Alert, which denies TPS beneficiaries the ability to adjust to LPR status.

The other *Arlington Heights* factors corroborate Plaintiffs' showing of discriminatory intent: the TPS Policy Alert was implemented without notice and comment or any public explanation, Compl. ¶ 165; it reverses longstanding practice, *id.* ¶ 101; and Defendants have not provided any description of the administrative record or process upon which the TPS Policy Alert was based. *See Arlington Heights*, 429 U.S. at 266.

Defendants cite the Supreme Court's recent decision vacating DHS's termination of the Deferred Action for Childhood Arrivals ("DACA") program, in which the Court rejected an equal protection claim based, in part, on discriminatory animus. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020). But that case is distinguishable for the reasons identified in *Make the Rd. New York v. Pompeo*, --- F. Supp. 3d ---, 2020 WL 4350731, at *19 (S.D.N.Y. 2020). For instance, while *Regents* discounted President Trump's anti-immigrant remarks

because they were too "remote in time and made in unrelated contexts" to be "[]illuminating," *id.* at 1916, the President's demeaning remarks about TPS beneficiaries from majority non-white countries are made in precisely the context at issue and about the very countries from which the Individual Plaintiffs came. *See* Compl. ¶ 171. Plaintiffs do not simply allege that "more immigrants of color are hurt by the agency action at issue," *Make the Rd. New York*, 2020 WL 4350731, at *19; they allege that Defendants' decision to shut down a process used almost entirely by immigrants of color has a disproportionate impact on them. Moreover, *Regents* states that "contemporary statements" are probative, but it did not lay down a bright line rule that only statements made at the precise moment a policy is enacted count. *See Regents*, 140 S. Ct. at 1916. This Court should not adopt such a rule here, where Plaintiffs' allegations focus on comments made about TPS beneficiaries within the same Presidential administration.

Thus, because "Plaintiffs have raised a plausible inference that issuance of the [TPS Policy Alert] was based, at least in part, on discriminatory motives" this claim should "survive Defendants' motion to dismiss." *Id.*

**CONCLUSION**

For the reasons given, Defendants' motion to dismiss should be denied.

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Respectfully submitted,

*/s/ Benjamin Seel*

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